

Zamil Steel Vietnam Buildings Co Ltd v GTK Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(IM)(NCC)-676-04 OF 2014

ZAHARAH IBRAHIM, MAH WENG KWAI AND VARGHESE GEORGE
JJCA

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19 JUNE 2015

Companies and Corporations — Winding up — Application for leave to initiate proceedings against wound up company — Short service of cause papers — Whether rendered consequent orders a nullity — Whether a curable irregularity — Whether court may abridge time — Companies (Winding-Up) Rules 1972 rr 7, 192 & 194

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Companies and Corporations — Winding up — Application for leave to initiate arbitration proceedings against wound up company — Whether amounts to a stay of the winding up order — Whether need to first seek leave to intervene in the winding up proceedings — Whether leave of the winding up court a mandatory prerequisite to commencement of action against wound up company — Whether winding up court lacked jurisdiction to grant leave — Companies Act 1965 s 226(3)

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The appellant ('Zamil Steel'), a Vietnamese company, had a main contract with one Bahru Stainless Sdn Bhd ('BSSB'). Zamil Steel had appointed GTK Bhd ('the respondent') as a subcontractor under that main contract. The subcontract was governed by Vietnamese law. By a writ issued on 11 December 2012 ('the JB Suit'), the respondent had commenced an action against Zamil Steel and BSSB. Zamil Steel applied for a stay of the JB Suit pursuant to s 10 of the Arbitration Act 2005. The High Court allowed Zamil Steel's application and ordered ('the stay order') that the JB Suit against Zamil Steel be stayed pending arbitration between the parties in Vietnam. When the stay order was obtained (on 11 April 2013), Zamil Steel was not aware that the respondent had been wound up by the High Court on 11 March 2013. On 18 July 2013 the respondent applied to set aside the stay order on the grounds that Zamil Steel could not in law have proceeded against the respondent on 11 April 2013 without leave of court, as there was a winding up order in place against the respondent on that date. Zamil Steel conceded to the setting aside of the stay order without prejudice to Zamil Steel's right to file an application in the winding up proceedings itself to obtain leave to pursue with a fresh order for stay of the JB Suit against Zamil Steel on account of the intended arbitration in Vietnam. On 11 December 2013 Zamil Steel filed an application ('encl 11') in the winding up proceedings together with a certificate of urgency. Enclosure 11

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- A was fixed to be heard on 13 December 2013 and having extracted the relevant papers, solicitors for Zamil Steel managed to serve the same on the respondent's solicitors and also on the official receiver on the afternoon of 12 December 2013. On 13 December 2013, neither the respondent's solicitors nor the official receiver were present in court. Nevertheless, the court granted orders
- B ('the leave orders') to the effect that: (a) Zamil Steel be granted leave to intervene in the winding up action for the purpose of obtaining leave to file a stay of proceedings in the JB Suit and to institute the Vietnam arbitration proceedings; and (b) pursuant to s 226(3) of the Companies Act 1965 ('the Act'), Zamil Steel be granted leave to file a stay of proceedings application in
- C the JB Suit and to institute the Vietnam arbitration proceedings against the respondent. On 8 January 2014, the respondent applied ('encl 15') to set aside the leave orders. The learned judicial commissioner ('JC') who heard encl 15 allowed the respondent's application and ordered that the leave to intervene
- D and leave to commence arbitration proceedings in Vietnam be set aside. Zamil Steel appealed against the decision of the JC in setting aside the leave to institute arbitration proceedings in Vietnam.

Held, allowing the appeal with no order as to costs:

- E (1) There was no application in encl 11 for any stay of the winding up order, or for that matter, for the winding up proceedings itself being halted from taking its normal course. The first error of the JC was to treat the orders
- F sought for in encl 11 as tantamount to a stay of the whole winding up order or to similar effect. There was no basis or sound reason for the JC to come to the conclusion that a stay was being applied for or intended in so far as the winding up itself was concerned. Zamil Steel's encl 11 application was only: (a) for leave to intervene in the winding up proceedings; and (b) for leave under s 226(3) of the Act to proceed
- G against the respondent to apply for a stay of proceedings of the JB Suit and to institute or continue with the arbitration proceedings in Vietnam (see paras 21–22).
- H (2) The orders applied for under item 2 of encl 11 were necessitated by the fact that a winding up order had already been entered against the respondent and in this case, firstly there was a pending proceeding, the JB Suit, initiated by the respondent which Zamil Steel intended to have stayed. Secondly, when the application in encl 11 was made, an arbitration proceedings had already been lodged by Zamil Steel at the Vietnam Arbitration Centre against the respondent and the latter had to be continued. Enclosure 11 was for all intents and purposes to comply
- I with the requirements of s 226(3) of the Act. It was obviously not an application under s 243 of the Act. The JC erred in treating encl 11 as being made under s 243 or was akin to that. This was a total misreading of the law (see paras 23 & 26).

- (3) It was a non-issue whether Zamil Steel was or was not a 'liquidator, creditor or a contributory' of the respondent. Once an order for winding up had been made, it was obligatory upon, and correspondingly open, to all third parties who intended to commence or continue with any 'proceeding' (already pending) against the company ordered to be wound up, to secure leave of the winding up court before they took any further action (see para 27). A B
- (4) There is no requirement under the Act, the Winding-Up Rules or the rules of procedure of the court for a third party (as was Zamil Steel in this case) to apply for and be formally allowed to intervene in the winding up proceedings as a pre-requisite before seeking or obtaining the leave required under s 226(3) of the Act (see para 28). C
- (5) With respect to the respondent's complaint that there had been short service of encl 11 and related papers on them, any non-compliance (if at all) with the requirement of the minimum two days service under r 7 of the Winding-Up Rules, did not have the effect of rendering the orders made under encl 11 a nullity. In any event, by r 192 of the same Rules (Companies (Winding-Up) Rules 1972), the court had the power to abridge any time appointed by the Rules and by r 194 it is provided that no proceedings taken would be rendered invalid by any defect or irregularity unless the court was of the opinion that substantial injustice had been caused (see paras 29–30). D E
- (6) Enclosure 11 and relevant papers had been served, in any event, the previous afternoon on the respondent and if there was a need for further time on the part of the respondent, they ought to have firstly attended court on 13 December 2013 and applied for the same. This they did not do (see para 30). F
- (7) The respondent's contention that the winding up court lacked jurisdiction to grant leave was wholly misconceived (see para 31). G

[Bahasa Malaysia summary]

Perayu ('Zamil Steel'), sebuah syarikat dari Vietnam, mempunyai kontrak dengan Bahru Stainless Sdn Bhd ('BSSB'). Zamil Steel telah melantik GTK Bhd ('responden') sebagai subkontraktor di bawah kontrak utama. Subkontrak ditadbir oleh undang-undang Vietnam. Melalui writ yang dikeluarkan pada 11 Disember 2012 ('Guaman JB'), responden telah memulakan satu tindakan terhadap Zamil Steel dan BSSB. Zamil Steel memohon bagi penggantungan guaman JB di bawah s 10 Akta Timbang Tara 2005. Mahkamah Tinggi membenarkan permohonan Zamil Steel dan memerintahkan ('perintah penggantungan') agar guaman JB terhadap Zamil Steel digantung sementara menunggu timbang tara antara pihak-pihak di Vietnam. Apabila perintah penggantungan diperolehi (pada 11 April 2013), Zamil Steel tidak menyedari bahawa responden telah digulung oleh Mahkamah Tinggi pada 11 Mac 2013. H I

- A Pada 18 Julai 2013, responden memohon untuk mengetepikan perintah penggantungan atas alasan bahawa di bawah undang-undang, Zamil Steel tidak boleh memulakan guaman terhadap responden pada 11 April 2013 tanpa kebenaran mahkamah, kerana terdapat perintah penggulangan terhadap responden pada tarikh tersebut. Zamil Steel akur dengan pengeneapan
- B perintah penggantungan tanpa prejudis kepada hak Zamil Steel untuk memfailkan permohonan dalam prosiding penggulangan itu sendiri bagi mendapatkan kebenaran bagi memulakan perintah guaman JB yang baru terhadap Zamil Steel atas sebab timbang tara di Vietnam. Pada 11 Disember 2013, Zamil Steel memfailkan permohonan ('lampiran 11') dalam prosiding
- C penggulangan bersama-sama dengan sijil perakuan segera. Lampiran 11 ditetapkan bagi perbicaraan pada 13 Disember 2013 dan setelah dokumen-dokumen yang relevan diekstrak, peguamcara Zamil Steel berjaya menyerahkan kesemuanya kepada peguamcara responden dan penerima rasmi
- D pada tengahari 12 Disember 2013. Pada 13 Disember 2013, peguamcara responden mahupun penerima rasmi tidak hadir di mahkamah. Namun begitu, mahkamah membenarkan perintah-perintah ('perintah-perintah penggulangan') yang memberikan kesan: (a) Zamil dibenarkan untuk mencelah dalam tindakan penggulangan bagi tujuan mendapatkan kebenaran
- E untuk memfailkan prosiding penggantungan dalam guaman JB dan memulakan prosiding timbang tara Vietnam; dan (b) di bawah s 226(3) Akta Syarikat 1965 ('Akta'), Zamil Steel dibenarkan untuk memfailkan permohonan prosiding penggantungan dalam guaman JB dan memulakan prosiding timbang tara Vietnam terhadap responden. Pada 8 Januari 2014,
- F responden memohon (lampiran 15) untuk mengetepikan perintah-perintah kebenaran. Pesuruhjaya kehakiman ('PK') yang mendengar lampiran 15 membenarkan permohonan responden dan memerintahkan agar kebenaran mencelah dan kebenaran memulakan prosiding timbang tara di Vietnam diketepikan. Zamil Steel merayu terhadap keputusan PK dalam mengetepikan
- G kebenaran untuk memulakan prosiding timbang tara di Vietnam.

Diputuskan, membenarkan rayuan tanpa perintah terhadap kos:

- (1) Tiada permohonan dalam lampiran 11 untuk apa-apa penggantungan perintah penggulangan atau bagi prosiding penggulangan itu sendiri
- H dihentikan daripada berjalan seperti biasa. Kekhilafan pertama PK adalah dengan menganggap perintah yang dipohon dalam lampiran 11 sebagai sama seperti penggantungan keseluruhan penggulangan perintah atau mempunyai kesan yang sama. Tidak ada asas atau sebab yang kukuh untuk PK memutuskan bahawa penggantungan yang dipohon atau
- I dicadangkan setakat penggulangan relevan. Lampiran 11 permohonan Zamil Steel hanyalah: (a) bagi mendapatkan kebenaran untuk campur tangan dalam prosiding penggulangan; dan (b) bagi mendapatkan kebenaran di bawah s 226(3) Akta untuk meneruskan terhadap responden memohon untuk menangguhkan prosiding saman JB dan

- untuk memulakan atau meneruskan prosiding timbang tara di Vietnam (lihat perenggan 21–22). A
- (2) Perintah yang dipohon di bawah item 2 lampiran 11 diperlukan berdasarkan fakta bahawa satu perintah penggulungan telah dimasukkan terhadap responden dan dalam kes ini, pertamanya terdapat prosiding yang tertangguh, guaman JB yang dimulakan oleh responden yang mana dimaksudkan oleh Zamil Steel untuk digantung. Keduanya, apabila permohonan dalam lampiran 11 dibuat, prosiding timbang tara telah dibuat oleh Zamil Steel di Pusat Timbang Tara Vietnam terhadap responden dan ia terpaksa diteruskan. Lampiran 11 adalah untuk tujuan dan maksud mematuhi keperluan s 226(3) Akta. Ia jelas bukan permohonan di bawah s 243 Akta. PK terkhilaf dalam menganggap lampiran 11 dibuat di bawah s 243 atau serupa dengan itu. Ini terjumlah kepada salah tafsiran undang-undang (lihat perenggan 23 & 26). B
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- (3) Ia bukan satu isu sama ada Zamil Steel adalah atau bukan ‘pelikuidasi, pemiutang atau penyumbang’ responden. Apabila satu perintah penggulungan telah dibuat, ia wajib, dan sejajar dengan itu terbuka kepada semua pihak ketiga yang bertujuan untuk memulakan atau meneruskan mana-mana ‘prosiding’ (yang masih tertangguh) terhadap syarikat yang diperintahkan agar digulung, untuk mendapatkan kebenaran penggulungan mahkamah sebelum mereka mengambil tindakan lanjut (lihat perenggan 27). D
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- (4) Tidak ada keperluan di bawah Akta, Kaedah-Kaedah Penggulangan atau peraturan prosedur mahkamah bagi pihak ketiga (seperti Zamil Steel dalam kes ini) untuk memohon dan secara rasmi dibenarkan untuk campur tangan dalam prosiding penggulangan sebagai prasyarat sebelum memohon atau mendapat kebenaran yang diperlukan di bawah s 226 (3) Akta (lihat perenggan 28). F
- (5) Berkenaan dengan aduan responden bahawa berlaku kekurangan penyampaian lampiran 11 dan kertas kerja yang berkaitan ke atasnya, ketidakpatuhan (jika ada) pada keperluan perkhidmatan dua hari minimum di bawah k 7 Kaedah-Kaedah Penggulangan, tidak mempunyai kesan untuk menjadikan semua perintah yang dibuat di bawah lampiran 11 terbatal. Dalam apa jua keadaan, k 192 Kaedah-Kaedah (Penggulangan) Syarikat 1972, mahkamah mempunyai kuasa untuk memendekkan apa-apa masa yang ditetapkan oleh Peraturan dan k 194 menetapkan syarat bahawa tiada prosiding akan menjadi tidak sah akibat mana-mana kecacatan atau ketidakteraturan melainkan jika mahkamah berpendapat bahawa ketidakadilan besar telah berlaku (lihat perenggan 29–30). G
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- (6) Lampiran 11 dan dokumen-dokumen yang berkaitan telah diserahkan, dalam apa jua keadaan, tengahari sebelumnya kepada responden dan jika

- A terdapat keperluan untuk masa yang selanjutnya oleh responden, mereka sepatutnya menghadiri mahkamah terlebih dahulu pada 13 Disember 2013 dan memohonnya. Ini tidak dilakukan (lihat perenggan 30).
- B (7) Tanggapan responden bahawa mahkamah penggulungan tidak mempunyai bidang kuasa untuk memberikan kebenaran adalah salah (lihat perenggan 31).]

Notes

- C For cases on winding up in general, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1261–2044.

Cases referred to

- D *Ham Ho Seng & Anor v Aik-Aik Holdings Sdn Bhd & Anor and another suit* [2000] 2 MLJ 60, HC (refd)

Legislation referred to

- E Arbitration Act 2005 s 10
Companies Act 1965 ss 226(3), 243
Companies (Winding-Up) Rules 1972 rr 7, 7(1), (2), 192, 194

Appeal from: Companies Winding-Up No 28NCC-17–01 of 2013 (High Court, Kuala Lumpur)

- F *Oon Thian Seng (T S Oon & Partners) for the appellant.*
Habeeb Rahman (Ameruddin with him) (Ameen Harbhajan & Co) for the respondent.

Varghese George JCA:

- G [1] In order to place this appeal before us in its proper context it is necessary at the outset to make reference to related antecedents and certain prior proceedings involving the parties.
- H [2] The appellant ('Zamil Steel'), a Vietnamese company, had a main contract with one Bahru Stainless Sdn Bhd. Zamil Steel had appointed GTK Bhd ('the respondent') as a subcontractor under that main contract. The subcontract was governed by Vietnamese law and cl 21 of the 'General Sub-Contract Conditions' read as follows:
- I 21. APPLICABLE LAW
- This subcontract constitutes a contract subject to the Laws, Rules and Regulations in force in the Socialist Republic of Vietnam.

JB HIGH COURT GUAMAN SIVIL NO 22NCVC-433-11 TAHUN 2012 ('JB SUIT') A

[3] By a writ issued on 11 December 2012 in the JB Suit, the respondent had commenced an action, wherein Zamil Steel was named as the first defendant, and Baharu Stainless Sdn Bhd, as the second defendant. B

[4] On 15 February 2013 Zamil Steel had applied for a stay of the JB Suit pursuant to s 10 of the Arbitration Act 2005, and for the respondent's claim against Zamil Steel to be dealt with at the Vietnamese Arbitration Centre. C

On 11 April 2013 the High Court at JB allowed Zamil Steel's application and ordered that the JB Suit against Zamil Steel be stayed pending arbitration between the parties in Vietnam.

[5] When that order was obtained (11 April 2013), Zamil Steel was not aware that the respondent had been ordered to be wound up by the High Court in Kuala Lumpur on 11 March 2013 in KL High Court Companies Winding-Up No 28NCC-17-01 of 2013, on a petition presented by one, International Paint Sdn Bhd. D
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[6] On 18 July 2013 the respondent applied to set aside the order granted in the JB Suit on 11 April 2013 on the grounds that the said order of court was invalid and/or that Zamil Steel could not in law have proceeded against the respondent on 11 April 2013 without leave of court, as there was a winding up order in place against the respondent on that date. F

[7] When the respondent's application came up for disposal, Zamil Steel conceded to the setting aside of the order of 11 April 2013 in the JB Suit without prejudice however to Zamil Steel's right to file an application in the winding up proceedings itself to obtain leave to pursue with a fresh order for stay of the JB Suit against Zamil Steel on account of the intended arbitration in Vietnam. G

KL HIGH COURT COMPANIES WINDING-UP NO 28NCC-17-01 OF 2013 ('WINDING UP PROCEEDINGS') H

[8] In this proceedings as noted earlier, a winding up order had been made against the respondent on 11 March 2013 and the official receiver had been appointed the liquidator in respect of the respondent. I

[9] On 11 December 2013 Zamil Steel filed an application (encl 11) in the winding up proceedings together with a certificate of urgency. The application was fixed to be heard on 13 December 2013 and having extracted the relevant

A papers, solicitors for Zamil Steel managed to serve the same on the respondent's solicitors on record then and also on the official receiver on the afternoon of 12 December 2013.

B [10] On 13 December 2013, neither the respondent's solicitors nor the official receiver were present in court but upon hearing counsel for Zamil Steel the following orders as per the terms of Zamil Steel's application were granted by the learned judge:

IT IS HEREBY ORDERED THAT:

C (i) that the proposed intervener, Zamil Steel Vietnam Buildings Co Ltd, be granted leave to intervene in this action for the purpose of obtaining leave to:

D (a) file a stay of proceedings application in Johor Bahru Civil Suit No 22NCVC-433-11 of 2012 commenced by GTK Bhd, who has been wound up in this actions, against Zamil Steel Vietnam Buildings Co Ltd; and

E (b) institute and/or to continue with the Vietnam arbitration proceedings against GTK Bhd ie Vietnam Arbitration Case No 18/13 lodged with the Vietnam International Arbitration Centre; and

(ii) That pursuant to s 226(3) of the Companies Act 1965 (Act 125), the proposed intervener be granted leave to:

F (a) file a stay of proceedings application in Johor Bahru Civil Suit No 22NCVC-433-11 of 2012 commenced by GTK Bhd, who has been wound up in this action, against Zamil Steel Vietnam Buildings Co Ltd;

G (b) institute and/or to continue with the Vietnam arbitration proceedings against GTK Bhd ie Vietnam Arbitration Case No 18/13 lodged with the Vietnam International Arbitration Centre.

H [11] On 8 January 2014, the respondent through their counsel filed an application (encl 15) to set aside the orders granted by the winding up court on 13 December 2013. The respondent's application was heard on 27 February 2014. (Meanwhile the official receiver was excused from further participation in the matter after confirming that the respondent had been permitted to pursue the matter through separate solicitors).

I [12] On 26 March 2014, the learned judicial commissioner who heard encl 15 allowed the respondent's application thereto. The material part of the orders granted by the court was as follows:

ADALAH DIPERINTAHKAN HARI INI bahawa:

- (a) Bahawa Perintah kebenaran untuk mencelah yang diberikan kepada pencelah Zamil Steel Vietnam Buildings Co. Ltd. untuk memfailkan suatu permohonan penangguhan prosiding-prosiding di dalam Guaman Sivil Johor Bahru No. 22NCVC-433-11/2012 diketepikan; **A**
- (b) Bahawa Perintah kebenaran yang diberikan kepada Pencelah Zamil Steel Vietnam Buildings Co. Ltd. untuk memulakan dan/atau meneruskan dengan prosiding timbangtara di Vietnam terhadap G.T.K. Berhad diketepikan; **B**

THE APPEAL BEFORE US

[13] The appeal before us by Zamil Steel was only against part of the decision of the learned judicial commissioner and it was expressed in the following manner:

... against such part only of the said decision as decides that:

- (i) The Leave Order given to the intervener Zamil Steel Vietnam Buildings Co. Ltd. to institute and/or continue with the arbitration proceedings in Vietnam against G.T.K. Berhad be set aside **D**

JUDGMENT OF THE HIGH COURT

[14] We have perused the grounds of judgment issued by the court and note that there were three dominant reasons which appeared to have influenced the learned judicial commissioner to allow the respondent's encl 15 application. **E**

[15] They were: **F**

- (a) that there was non-compliance by Zamil Steel of r 7(1) and (2) of the Companies (Winding-Up) Rules 1972 ('the Winding-Up Rules') which had resulted in short service of encl 11 on the respondent and/or the official receiver; accordingly the orders of court of 13 December 2013 without the respondent being given an opportunity to be heard was wrongfully obtained and therefore invalid; **G**
- (b) that the encl 11 application of Zamil Steel was in effect and substance an application to stay the winding up proceedings itself, since Zamil Steel could not in law proceed against a wound up company (the respondent) unless there was first a stay of the winding up order; and **H**
- (c) that pursuant to s 243 of the Companies Act 1965, ('the CA') only a liquidator, creditor or contributory of the company that was being wound up was entitled to apply for a stay of the winding up order; Zamil Steel, who was not a liquidator, creditor or contributory of the respondent, therefore lacked locus standi to bring the encl 11 application. **I**

A [16] The learned judicial commissioner, it was also noted, declined to consider whether or not there were merits in Zamil Steel's encl 11 application and in this regard went on to add the following puzzling observation in his grounds:

B It is unnecessary to consider further the arguments of the intervener (Zamil Steel) on the merits of the orders to be allowed. There might be merits for the order although denied by the respondent but the crucial factor to consider is this; if there is indeed merits, why did the intervener give short notice for the application.

C OUR DECISION

D [17] Having considered all the material available in this appeal and the submissions of the respective counsel for the parties, there was no doubt in our mind that the learned judicial commissioner had taken a wrong approach to the issues that were before him and had wholly misdirected himself as to the nature of the application contained in encl 11 and/or procedural requirement in respect of such an application.

E [18] Before we elaborate further, it needs to be clarified and restated that the appeal of Zamil Steel before us was limited to only that part of the court order of 13 December 2013 (under encl 11), namely:

F (ii) That pursuant to s 226(3) of the Companies Act 1965 (Act 125), the proposed intervener be granted leave to:
(b) institute and/or to continue with the Vietnam arbitration proceedings against GTK Bhd ie Vietnam Arbitration Case No 18/13 lodged with the Vietnam International Arbitration Centre.

be reinstated.

G [19] It was obvious that there were two parts to the orders sought under encl 11. The first prayed for Zamil Steel – '1. ... be granted leave to intervene in this action for the purpose of obtaining leave to:

H (a) ...
(b) ... '.

This clearly was to intervene in the winding up proceedings. The appellant was not pursuing any longer for an order for leave to intervene in the winding up proceedings in this appeal.

I [20] The second part of encl 11 was – '2. That pursuant to Section 226(3) ... the proposed intervener be granted leave to:
(a) ...

(b) ...’.

A

[21] There was definitely no application in encl 11 for any stay of the winding up order, or for that matter, for the winding up proceedings itself being halted from taking its normal course. We agree with counsel for Zamil Steel that the first error of the learned judicial commissioner was to treat the orders sought for in encl 11 as tantamount to a stay of the whole winding-up order or to similar effect. In our view there was no basis or sound reason for the learned judicial commissioner to come to the conclusion that a stay was being applied for or intended in so far as the winding up itself was concerned.

B

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[22] Zamil Steel’s encl 11 application was only:

- (a) for leave to intervene in the winding up proceedings; and
- (b) for leave under s 226(3) of the CA – to proceed against the respondent (as it had been wound up) for the specific purposes listed as 2(a) and (b) namely, to apply for a stay of proceedings of the JB Suit and to institute or continue with the arbitration proceedings in Vietnam.

D

[23] The orders applied for under item 2 of encl 11 were necessitated by the fact that a winding up order had already been entered against the respondent and in this case, firstly there was a pending proceeding, the JB Suit, initiated by the respondent which Zamil Steel intended to have stayed. Secondly, as matters stood at that date when the application in encl 11 was made, an arbitration proceedings had already been lodged/registered by Zamil Steel at the Vietnam Arbitration Centre against the respondent and the latter had to be continued.

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[24] Section 226(3) of the CA was in the following terms:

(3) When a Winding-Up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except –

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- (a) by leave of the Court; and
- (b) in accordance with such terms as the Court imposes.

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The rationale for this specific provision has long been accepted as being to protect generally the interest of the whole class of creditors and to ensure that no further liability or expenses (including unnecessary costs) were fastened on to the company ordered to be wound up or its assets by any future or even ongoing action brought against that company.

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[25] An application for leave under s 226(3) of the CA had to be made in the court making the winding up order and not in any other court so that the court was aware of all such suits and exercise such authority of supervision by

A imposing relevant terms and conditions for the proper conduct of the winding up process (see *Ham Ho Seng & Anor v Aik-Aik Holdings Sdn Bhd & Anor and another suit* [2000] 2 MLJ 60).

B [26] In our assessment, encl 11 was for all intents and purposes to comply with the requirements of s 226(3) of the CA. It was obviously not an application under s 243 of the CA and the learned judicial commissioner was in further error to have treated Zamil Steel's application in encl 11 as one being made or pursued under s 243 or was akin to that. With respect, this was a total misreading of the law by the court below.

C [27] It followed then that it was a non-issue whether Zamil Steel was or was not a 'liquidator, creditor or a contributory' of the respondent. Once an order for winding up had been made, it was obligatory upon, and correspondingly open, to all third parties who intended to commence or continue with any
D 'proceeding' (already pending) against the company ordered to be wound up, to secure leave of the winding up court before they took any further action.

E [28] We were also of the considered view that there was no requirement under the CA, the Winding-Up Rules or the rules of procedure of the court for a third party (as was Zamil Steel in this case) to apply for and be formally allowed to intervene in the winding up proceedings as a pre-requisite before seeking or obtaining the leave required under s 226(3) of the CA. There was nothing that restricted Zamil Steel from proceeding with the appeal as taken
F before us, namely, to reinstate only that part of the order of 13 December 2013 which had granted them leave to institute and/or to continue with the Vietnam arbitration proceedings against GTK Bhd (the respondent) ie Vietnam Arbitration Case No 18/13 lodged with the Vietnam International Arbitration Centre.

G [29] Finally, with respect to the complaint of the respondent that there had been short service of encl 11 and related papers on them (that is prior to the orders being granted by the court on 13 December 2013), we need only say that any non-compliance (if at all) with the requirement of the minimum two
H days service under r 7 of the Winding-Up Rules, did not have the effect of rendering the orders made under encl 11 a nullity, as contended by counsel for the respondent.

Rule 7(2) of the Winding-Up Rules in so far as in material reads as follows:

I Every application in Chambers ... and the summons shall be served not less than two days before the day named in the summons, *unless in any case it shall be otherwise ordered.* (Emphasis added.)

In this case, the date had been fixed by the court based on the certificate of urgency that had been filed together with encl 11, by Zamil Steel.

[30] In any event, by r 192 of the same Rules the court had the power to abridge any time appointed by the Rules and by r 194 it was provided that no proceedings taken would be rendered invalid by any defect or irregularity unless the court was of the opinion that substantial injustice had been caused.

It must be pointed out that encl 11 and relevant papers had been served, in any event, the previous afternoon on the respondent and if there was a need for further time on the part of the respondent, they ought to have firstly attended court on 13 December 2013 and applied for the same. This they did not do.

[31] It is also pertinent to note here that there were four reasons cited by the respondent for the setting aside application brought under encl 15. Two were related to the issue of 'short service' and consequent alleged denied opportunity to be heard, while the other two were basically that there were no provision under the CA to vest the court with jurisdiction to grant the orders for leave as applied for by Zamil Steel in encl 11. The statutory stipulation under s 226(3) of the CA that had to be complied with once a company had been ordered to be wound up, has been sufficiently addressed by us above. We found the respondent's contention that the winding up court lacked jurisdiction to grant leave to be therefore wholly misconceived.

Apart from those four reasons, there was no other substantive grounds raised by the respondent in encl 15 why Zamil Steel ought not to have been granted the leave applied for pursuant to s 226(3) of the CA.

[32] We were unanimous therefore that the appeal of Zamil Steel should be allowed and accordingly we did so with no order being made as to costs.

Appeal allowed with no order as to costs.

Reported by Kanesh Sundrum

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